No. 11,134

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. E. SPAULDING, L. B. MANLOVE and P. M. MANLOVE, co-partners doing business under the firm name and style of Manlove & Spaulding Mfg. Co.,

Appellants,

vs.

DOUGLAS AIRCRAFT COMPANY (a corporation), and UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Statutes

Texts

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APPELLANTS' OPENING BRIEF.

This is an appeal from a judgment rendered in favor of defendant corporation below in which action plaintiffs and appellants sought to recover from defendants a sum of money admittedly due for work and goods manufactured and delivered to defendant corporation. Defendant corporation refused to pay such amount, basing its refusal on a withholding order served on it by the Under Secretary of War, which order, in turn, was based upon a purported order, determining that appellants had made excessive profits, made under

authority of the Federal Renegotiation Act. Appellants contended that the Renegotiation Act was unconstitutional and void and the withholding order was also void and constituted no justification for the refusal of defendant to pay. Appellants asked for a declaratory judgment to the latter effect. The lower court refused to pass on the constitutionality of the Act and rendered judgment for defendant.

JURISDICTIONAL STATEMENTS.

The pleadings, facts and statutes conferring original jurisdiction upon the District Court of the United States and appellate jurisdiction upon this Court are as follows:

(1) Statutes Conferring Jurisdiction on the United States District Court.

The statute believed to sustain the jurisdiction of the United States District Court is as follows:

> "The District Courts shall have original jurisdiction * * * Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000 and (a) arises under the Constitution * * *, or (b) is between citizens of different States, * * *."
>
> 28 *USCA*, Section 41, subdiv. 1;
>
> *Judicial Code*, Section 24.

(2) Pleadings Showing the Existence of the District Court's Jurisdiction.

(a) The complaint, paragraph I (R. 2), alleges that each of appellants was and is a resident of the County of Los Angeles, State of California. Paragraph II of the complaint (R. 3) alleges that appellant, Douglas Aircraft Company, is a corporation organized and existing under the laws of the State of Delaware.

The answer of appellant Douglas Aircraft Company, in paragraphs IV and V (R. 22), admits the foregoing allegations of plaintiffs' complaint as also does paragraph XVI of the answer of the United States (R. 44).

(b) The complaint alleges the unconstitutionality of the Federal Renegotiation Act (R. 10-16). The answer of the Douglas Aircraft Company asserts the constitutionality of the Federal Renegotiation Act (R. 21) as does the answer of the United States (R. 38).

(3) The Statute Conferring Appellate Jurisdiction on the Circuit Court of Appeals.

28 *USCA*, Section 225; Judicial Code, Section 128; provides as follows:

> "The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

(4) The Federal Renegotiation Act, the Validity of Which Is Involved Herein.

This suit questions the constitutionality of the so-called Federal Renegotiation Act, Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982, which Act is set forth in full in the appendix hereto.

STATEMENT OF THE CASE.

The facts of this case are undisputed. The matter was presented to the lower court upon the matters of fact set forth in the pleadings and the findings of fact of the lower court are correct as far as they go, save in one particular which consists of a mere omission of a letter from defendant corporation to plaintiff.

The action was commenced to recover from defendant corporation, Douglas Aircraft Company, a sum of money for goods, wares and merchandise manufactured, made, sold and delivered to defendant corporation from *March 1, 1944 to July 31, 1944.*[1]

The complaint further alleged that defendant corporation refused to pay said sum solely for the reason that on May 1, 1944, Robert P. Patterson, Under Secretary of War, purporting to act under authority conferred on him by Section 801 of the Revenue Act of 1942 (the Renegotiation Act), had directed defendant corporation, by an order in writing "to withhold for the account of the United States any and all amounts (not in excess of $110,000 in the aggregate) otherwise

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[1]Complaint, par IV; R. 3.

due or which shall become due from you to said Manlove and Spaulding Manufacturing Company";[2] that said order was based upon a unilateral order and determination made by said Under Secretary of War purporting to determine under said Renegotiation Act that plaintiff, "during its fiscal year ended December 31, 1942" had made excessive profits in the sum of $110,000.[3]

The complaint further alleged that an actual controversy existed between plaintiff and defendant in that defendant maintained and contended that by virtue of the order to withhold said funds, made by the Under Secretary of War, said defendant corporation was without right, power or authority to pay to plaintiff said sum sued for and, under said order, had no alternative save and except to withhold and on demand pay said amount to the United States. On the other hand, plaintiffs contended that said withholding order was null and void and of no force and effect, that said Renegotiation Act was and is in violation of the Constitution of the United States and of the Fifth and Tenth Amendments thereto, and constituted no justification for the defendant's refusal to pay.[4]

The complaint further set forth 14 grounds on each of which it contended that said Renegotiation Act was unconstitutional and void.[5]

Based upon the forgoing allegations, all of which are set forth at length in paragraph V of the com-

[2]Complaint, par. V(e); R. 9-10.
[3]Complaint, par. V(d); R. 6-8.
[4]Complaint, par. V(h); R. 16.
[5]Complaint, par. V(f); R. 10 to 14.

plaint,[6] plaintiffs asked for a declaratory judgment decreeing that said Renegotiation Act was and is unconstitutional and void; that said withholding order was and is null and void and that said order purporting to determine excessive profits (under which said withholding order was made) was also null and void.

The two orders, one purporting to determine such excessive profits, the other the withholding order, are set forth in full in the complaint.[7]

The constitutionality of an Act of Congress being thus directly put in issue, the lower court, pursuant to a pertinent statute and by proper procedure, made its order allowing the United States to intervene solely for the purpose of presenting evidence and advancing arguments in support of the constitutionality of the Renegotiation Act.[8]

Both the defendant corporation[9] and the United States[10] appeared and filed answers. Each answer asserted the constitutionality of the Act.

Thereafter defendant corporation and the United States moved the lower court for summary judgment[11] "on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law and on the further ground that the complaint fails to state a claim upon which relief can be granted. The court lacks jurisdiction to

[6]R. 4 to 17.
[7]R. 6, 9.
[8]R. 35.
[9]R. 20.
[10]R. 37.
[11]R. 48.

try in this action any issue as to the amount of the excessive profits received by plaintiff."[12]

Thereafter the following stipulation was entered into by all parties to the action:

> "It Is Hereby Stipulated and Agreed by and between the parties to this action that the amount of the alleged indebtedness from the defendant corporation, Douglas Aircraft Company, Inc., to plaintiff is the sum of $27,580.80 as alleged in the answer of defendant, Douglas Aircraft Company, Inc., and not the sum of $31,048.33 as alleged in paragraph IV of the complaint.[13]

The motion for summary judgment was based upon the pleadings, the affidavit of Robert P. Patterson[14] and the affidavit of H. Struve Hensel.[15] A counter affidavit of R. E. Spaulding, one of the plaintiffs, was filed in opposition to the motion.[16]

At the hearing of the motion for summary judgment, various stipulations were entered into as to matters of fact,[17] all of which were correctly incorporated in the findings of fact set forth below.

The following counter motion for judgment was made by plaintiffs under the following circumstances:[18]

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[12]Note that the complaint did not raise any question as to whether the amount of alleged excessive profits was correct; neither did it seek any re-determination thereof. The sole question raised was as to the constitutionality of the Act and the validity of the orders made under its purported authority.

[13]R. 219.

[14]R. 50.

[15]R. 130.

[16]R. 211.

[17]R. 253-261.

[18]R. 264-266.

"The Court: Why can't we agree to this? It seems to me, counsel, the best way is to submit it so that either side will have a right to appeal when we get through.

Mr. Lowry: If that is going to be done, your Honor, I think the way it should be handled is for Mr. Friedman to make a cross-motion for judgment. I, at least, feel a little uncertain when things aren't done in the procedures that the court has established.

Mr. Friedman: Isn't this a proper procedure: if your Honor said, 'All right, I will set this down for trial tomorrow——'

The Court: You can make it now if it is satisfactory to counsel.

Mr. Lowry: All right, make it.

The Court: An oral motion for judgment.

Mr. Friedman: Very well, your Honor. At this time, then, on behalf of the plaintiffs, and in view of the fact that as a result of the pre-trial conference all of the factual issues have been settled and agreed upon, I move at this time that judgment be entered in favor of the plaintiff for the amount set forth in the stipulation as to the amount due, upon the ground that the Act is unconstitutional and, therefore, the order which the defendant sets up as justification for not paying the amount admittedly due are without any force or effect, because the Renegotiation Act is unconstitutional and void because the unilateral order of determination runs counter to the Constitution and runs counter to the Act and, therefore, the withholding order is without any vitality or effect.

Mr. Lowry: Your Honor, may it be agreed that our briefs and our affidavits are submitted in

opposition to the motion that counsel has just made?

Mr. Friedman: I will add to my motion that all the papers, records, pleadings and stipulations now on file before the court be considered as part of the motion.

The Court: Satisfactory to counsel?

Mr. Lowry: That is satisfactory, your Honor.

The Court: That brings it right down to where a determination will place you both in a position where either one of you, if you so desire, can appeal.

Mr. Friedman: That was my idea in the matter. And may I add this, that the defendants and goverment raise no objection to the manner or form in which the motion is presented, that is, waive customary notice of presentation of such motions?

Mr. Lowry: We have no objection.

Mr. Friedman: And there is no objection to its being made orally, as suggested by the court?

Mr. Lowry: We have no objection to the form of the motion."

After the making of the foregoing counter-motion for judgment, a discussion took place between court and counsel in which all counsel agreed that, as the facts were without conflict, the only question before the court was the constitutionality of the Renegotiation Act. The judge of the lower court frankly announced that if he could find any way of disposing of the case, without passing on the constitutionality of the Act, he would follow such course. One of the trial judge's statements in this regard is as follows:

"The Court: The court has been very much interested in the whole subject matter and appre-

ciates the able manner that counsel on both sides have presented the case. The only difference between counsel, it seems to me, is that we have about three sides to this case, two parties and the court. The court is trying and is still going to try to decide this case without passing upon the constitutionality: I feel that it is my duty, and I have spent considerable time on that angle of the case. While you gentlemen have tried to force me right into the corner, I have been trying to find a way to get out of that corner. I want to tell you frankly if I can decide this case to my own satisfaction without passing on the constitutionality, I am going to do it."[19]

After the submission of the cause the lower court made the following Findings of Fact:[20]

"Findings of Fact.

1. That at all times herein mentioned each of the plaintiffs was a citizen of the State of California, a citizen and inhabitant of the County of Los Angeles in the District aforesaid, and that the business of the plaintiffs was being operated and conducted in said county of Los Angeles; that defendant was a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business within the Central Division of this District; and that the matter in controversy in this suit exceeds the sum or value of $3,000.00, exclusive of interest and costs.

2. That at times herein mentioned defendant was engaged as a prime contractor with the

[19]R. 314.
[20]R. 233-240.

Government of the United States in manufacturing airplanes for the Government in furtherance of the war effort; that plaintiffs were engaged in the manufacture of airplane parts for the defendant and others devoting approximately 100 per cent of its capacity to the production of war materials and obtaining the materials used by them in said manufacture through priorities.

3. That the defendant during the year 1942 entered into numerous subcontracts in the form of purchase orders with the plaintiffs for the manufacture, production and sale of mechanical fittings and parts in accordance with blueprints and specifications furnished by defendant, which purchase orders were given to and accepted by plaintiffs on the strength of bids submitted to defendant by plaintiffs as the result of competitive bidding in which plaintiffs and other firms and corporations participated; and that plaintiffs at all times knew that the parts manufactured by them for the defendant were to be used in the fabrication of airplanes for and at the expense of the Government.

4. That on or about November 14, 1942, plaintiffs addressed a letter to defendant (Exhibit B attached to defendant's answer) in the words and figures following, to-wit:

'November 14, 1942

Douglas Aircraft Company, Inc.
Materiel Division
P. O. Box 9337, Station S.
Los Angeles, California

Subject: Renegotiation Clause

Gentlemen:

We have received your letter of September 14, 1942, on the subject of renegotiation.

We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective.

Yours sincerely,
Manlove & Spaulding
Mfg. Co.
(signed) By R. E. Spaulding
Partner'

That said Special Conditions 42 and 42A were and are in the words and figures following:

'Special Condition No. 42—Renegotiation under Army Contracts

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller under this contract can be determined with reasonable certainty, the Secretary and Seller will renegotiate the contract price to eliminate there-

from any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

(2) Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary, (a) be deducted by Buyer from payments otherwise due to Seller under this contract; or (b) be paid by Seller directly to the Government.

(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.

(5) As used in this Article:

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the contracting officer;

(b) The terms 'renegotiate' and 'renegotiation' have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942;

(c) The term 'this contract' means this contract as modified from time to time.

(6) Seller agrees (a) to include in each fixed-price or lump-sum subcontract hereunder for an amount in excess of $100,000 the foregoing sections (1) to (5) inclusive, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary and which the Secretary directs the Seller to withhold from payments otherwise due under such subcontract and actually unpaid at the time the Seller receives such direction.

"The term "subcontract" includes any purchase order from or any agreement with Seller (i) to perform all or any part of the work to be done under this contract, or to make or furnish all or any part of any articles or structures covered by this contract, (ii) to supply any services required directly for the production of any articles or structures covered by this contract, or any component part thereof, not including services for the general operation of Seller's plant or business, (iii) to make or furnish any articles destined to become a component part of any article covered by this contract, or (iv) to make or furnish any articles acquired by Seller primarily for the performance of this contract, or

this contract and any other contract with the United States. The term "articles" includes any supplies, materials, machinery, equipment or other personal property.'

Special Condition No. 42A. Renegotiation under Navy Contracts

'(a) At any time, when in the judgment of the Secretary, the profits accruing to Seller under this Purchase Order can be determined with reasonable certainty, the Secretary and Seller, upon the written demand of the Secretary, will renegotiate the price with a view to eliminating such profits as are found as a result of such negotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the price, the amount of such reduction shall, as may be directed by the Secretary, be deducted by Buyer from payments to Seller under this Purchase Order; or be paid by Seller directly to the Government; or be repaid by Seller to Buyer.

(c) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount repaid to Buyer or paid to the Government by Seller or deducted by Buyer from payments to Seller pursuant to directions from the Secretary in accordance with the provisions hereof. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts repaid by or withheld from Seller hereunder.

(d) The term "Secretary" as used herein means the Secretary of the Navy and his duly authorized representatives.'

Thereafter defendant continued to issue such orders to plaintiffs and plaintiffs continued to perform the same.

5. That on February 2, 1944, Robert P. Patterson, Under Secretary of War, acting pursuant to the Renegotiation Act, as amended, duly made a unilateral order (in the words and figures set out in paragraph V(d) of the complaint) determining that $110,000.00 of the profits realized by plaintiff during its fiscal year ending December 31, 1942, under its subcontracts subject to renegotiation pursuant to said Act are excessive; and thereafter on May 1, 1944, said Robert P. Patterson, Under Secretary of War, duly directed defendant by an order in the words and figures set out in paragraph V(e) of the complaint to withhold for the account of the United States any and all amounts (not in excess of $110,000.00 in the aggregate) otherwise due or which shall become due from defendant to plaintiffs. That pursuant to said direction defendant withheld from plaintiffs for the account of the United States the sum of $27,580.80 for the recovery of which amount this suit was instituted by plaintiffs. It is admitted that defendant's refusal to pay plaintiffs the amount so withheld is based solely on the withholding order issued by the Under Secretary of War and plaintiffs admit that if the Renegotiation Act is constitutional they have no cause of action. Defendant and intervenor admit that if the Renegotiation Act is unconstitutional, plaintiffs should recover and judgment should be for the plaintiffs.

6. That all of the business done by plaintiffs during the fiscal year ending December 31,

1942, was with private firms, corporations and individuals and none of such business was done on prime contracts with the United States of America. All the individual orders and contracts of plaintiffs for the year 1942 varied in amounts from 60 cents to $8000.00 each.

7. That plaintiffs have not filed a petition for redetermination of its excessive profits in the Tax Court of the United States and the time for filing that petition has expired.

8. That there is no genuine issue between the parties as to any material fact and defendant is entitled to judgment as a matter of law.

9. That on September 12, 1944, the Court certified to the Attorney General, pursuant to the Act of August 24, 1943, 28 U.S.C.A. 401, the fact that the constitutionality of the Renegotiation Act, an Act of Congress affecting the public interest, was drawn in question herein and thereafter and on December 18, 1944, an order was made allowing intervention by the United States and directing that the United States be made a party to the cause.

10. That the amounts sued for by plaintiffs in the complaint herein represented work done by plaintiffs for defendant from the 1st day of March, 1944, to and including the 31st day of July, 1944, and did not comprise any work done by plaintiffs for defendant during the fiscal year ending December 31, 1942, and the amount thereof was and is in the stipulated and agreed sum of $27,580.80."

The findings of fact were followed by the court's conclusions of law[21] (hereinafter set forth) and directing that judgment be entered in favor of defendant.

Judgment was entered on July 30, 1945, as follows:

> "Ordered and Adjudged that plaintiffs take nothing by their suit; and that defendant, Douglas Aircraft Company, Inc., do have and recover from the plaintiffs its costs and charges in this behalf expended and have execution therefor."[22]

From the foregoing judgment plaintiffs have prosecuted this appeal.

SPECIFICATION OF ERRORS RELIED UPON BY PLAINTIFFS.

I.

The District Court erred in making the following conclusion of law:

> "1. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A establishes an agreement on behalf of the plaintiffs to be bound by the Renegotiation Act and thereby said agreement became a part of every purchase order, notwithstanding anything therein to the contrary; the parties having thus contracted, it becomes immaterial whether the Act is constitutional or not. Therefore, the parties by their own contract have eliminated the constitutional question."[23]

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[21] R. 240.
[22] R. 242.
[23] R. 240.

The foregoing conclusion is erroneous in each of the following particulars:

(a) It is not supported by the findings of fact and is directly contrary thereto. Finding of Fact No. 4[24] sets forth the letter of plaintiffs to defendant and this letter limits any renegotiation to contracts entered into with defendant and not by plaintiffs with anyone else. The Order purporting to determine excessive profits deals only with the year ending December 31, 1942, and is based *on all business done by plaintiffs during that year;* it is not confined solely to business done with defendant.

(b) The letter, if binding at all on plaintiffs, only consents to such clauses 42 and 42A being made part of any purchase order "in which you (defendant corporation) are required by law or by contract to insert such special conditions". The Renegotiation Act provides that such special conditions shall only be inserted in sub-contracts of $100,000 or more.[25] No contract of plaintiffs during the year 1942 exceeded the sum of $8000;[26] therefore, special conditions 42 and 42A never became a part of any contract with or purchase order placed by defendant corporation.

(c) The conclusion that "it becomes immaterial whether the Act is constitutional or not", is contrary to both the facts as found and the law. The special conditions purport to confer upon a secretary (of a

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[24]R. 234.

[25]Section 403 (b) (3) of the Sixth National Defense Appropriation Act, as amended by Revenue Act of 1942, Section 801 thereof.

[26]Finding of Fact 6, R. 239.

government department) the power to renegotiate contracts entered into between plaintiffs and private individuals—contracts to which the United States was not a party. If the Act is unconstitutional, this amounts to an agreement to confer jurisdiction on the government by consent. Jurisdiction must exist as a matter of law and cannot be conferred by consent. Besides, the incorporation of such special conditions did not affect the contracts of plaintiff and defendant. Defendant could not resort thereto and renegotiate the contract price—a price accepted after competitive bidding. Neither could the defendant derive any benefit from such renegotiation. The Act being unconstitutional, an agreement to be bound by its terms, to which agreement the United States was not a party and which agreement could not be enforced by the defendant, could not confer such power on the United States and the parties have not by such agreement "eliminated the constitutional question".

II.

The District Court erred in making the following conclusion of law:

> "2. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A, the conduct of plaintiffs in continuing thereafter to accept purchase orders from the defendant and to perform the same creates an estoppel and thereby plaintiffs have waived their right to assert the unconstitutionality of the Renegotiation Act and are estopped at this late date to retain any excessive

profits. Having accepted the benefits of said purchase orders, they are not now in a position to avoid the terms under which said purchase orders were issued and received."[27]

The foregoing conclusion of law is erroneous in each of the following particulars:

(a) This conclusion of law is, in effect, a restatement of the conclusions set forth in Conclusion of Law No. 1 and each of the reasons set forth as to the error of Conclusion of Law No. 1 are hereby referred to and advanced as to the error of Conclusion of Law No. 2.

(b) This second conclusion of law seeks to set up the doctrine of estoppel as preventing plaintiffs from asserting the unconstitutionality of the Act. Neither the doctrine of estoppel can be thus resorted to nor does the same apply. Estoppel arises when a party, by his act or conduct has led another party to do some thing which otherwise he would not have done and thus altered his position to his prejudice. Under such circumstances equity will not permit the first party to repudiate his act and thus gain an unfair advantage over the second party. Here, there was no act of plaintiffs which led defendants to do an act to its disadvantage. Whether plaintiffs insisted on or waived the constitutionality of the Act could not change the position of defendant. Be the Act void or valid defendant by its contract was legally bound to pay to plaintiff the agreed amount for the goods manufactured and delivered to it by plaintiffs.

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[27]R. 241.

law as announced in the case of *Coffman v. Breeze Corporations, Inc., supra.* In a suit to recover money under a contract, where the refusal to pay is based on an Act of Congress, the question of the constitutionality of the Act is directly before the court and must be decided.

VI.

The District Court erred in refusing to determine and adjudge that the Renegotiation Act is unconstitutional.

VII.

The District Court erred in denying the motion of plaintiffs for judgment.

VIII.

The District Court erred in granting the motion of defendant for judgment and in rendering judgment for defendants.

Each of the foregoing assignments of error were set forth in the "statement of points on which appellants intend to rely on appeal" as filed in the lower court[31] and in "appellants' statement of points intended to be relied on" in this Court.[32]

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[31]R. 245.
[32]R. 317.

ARGUMENT.

1. THE RENEGOTIATION ACT AND AMENDMENTS THERETO.

The Act of Congress involved herein, known as the "Renegotiation Act," is Title VIII of the Revenue Act of 1942 (Public Law 753, 77th Congress, 2d Session; 56 Stat. 798, 982. This Act is set forth in full in the appendix hereto. The original Renegotiation Act was enacted as Section 403 of the Sixth Supplemental National Defense Appropriation Act (56 Stat. 226, 245) and has undergone various amendments by subsequent Congressional action.

Believing that a correlation of these various acts will be of material assistance to the court, we here set forth the pertinent provisions of the original Act and the amendments thereto.

That Act was originally enacted April 28, 1942. The court here will be primarily concerned with the Act in its original form, and only incidentally with the later amendments. As originally enacted, the statute was made applicable only to contracts and subcontracts of the War and Navy Departments and the Maritime Commission. Other agencies have been added by subsequent amendments, but the scheme of the statute with respect to renegotiation remains essentially the same. "Renegotiation" is defined by the statute[33] as

> "the refixing by the Secretary of the Department of the contract price."

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[33]Section 403 of the Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245, effective April 28, 1942, 50 U. S. C. 1191.

Here Under Secretary of War Patterson purported to act under Subsection (c) of the statute, which says:[34]

> "The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor."

The statute was expressly made applicable (Subsection (e)):

> "to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act."

The power so given to the Secretary, the statute provided (Subsection (f)):

> "may be delegated, in whole or in part, by him to such individuals or agencies in such Depart-

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[34] 56 Stat. 226, 245.

ments as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

The statute was amended October 21, 1942, within the period here in controversy,[35] so as to add the Treasury Department to the renegotiating agencies. The other amendments then made, so far as is here material, all of which were declared to be "effective as of April 28, 1942," were these:

1. The statute for the first time undertook to define "excessive profits," but in legal effect added nothing to the statute because it merely said "'excessive profits' means * * * excessive profits." The language is this:[36]

"'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

2. The statute for the first time included a definition of a subcontract. The original Act mentioned, but did not in any way disclose what was to be embraced within, subcontracts.[37] The October, 1942 amendment defined "subcontract" to mean:

"any purchase order or agreement to perform all or any part of the work, or to make or fur-

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[35]By Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

[36]Section 801(a); 56 Stat. 798, 982.

[37]The original Act merely said (Section 403(a); 56 Stat. 226, 245):

"the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor."

nish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

3. The statute authorized the Secretary "when the contractor or subcontractor holds two or more contracts or subcontracts," to:

"renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract."

4. The statute authorized the Secretary to make his determination effective by, among other methods:

"directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract,"

or by any combination of the several methods mentioned in the statute.

The statute was amended a second time on July 1, 1943.[38] The only change made was to add to the Renegotiation Act, contracts and subcontracts of:

Defense Plant Corporation;
Metals Reserve Company;
Defense Supplies Corporation;
Rubber Reserve Company.

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[38]By Section 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347.

The third amendment was made July 14, 1943.[39] It merely added to the contracts subject to renegotiation, the so-called war brokers' contracts "under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder * * *." This amendment is not here important.

The fourth amendment is that made by the Revenue Act of 1943,[40] which became effective February 25, 1944. Substantial revisions were then made but for the most part they are presently unimportant[41] because not made applicable to the year 1942, with which the court here is concerned. For example, for the first time the statute undertook to specify standards and considerations to be taken into account in determining whether "excesive" profits exist. These provisions are, however, by express command of the statute made applicable only to fiscal years ending after June 30, 1943. They, therefore, do not apply to this case.

The 1944 amendments, in Section 403(e) (2), undertake to provide for redetermination in the Tax Court of an asserted renegotiation liability. It provides that one:

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[39]By Public Law 149, 78th Congress, 57 Stat. 564.

[40]Public Law 235, 78th Congress, 58 Stat. 21, 78.

[41]On the Constitutional issues, now brought before the Court, these amendments are highly important in that they disclose that Congress, by providing standards for the guidance of the Secretary, a hearing, and findings, and in other respects, has sought to cure for the future the features of unconstitutionality inherent in the original Act.

> "aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943 [that is to say, prior to February 25, 1944], with respect to a fiscal year ending before July 1, 1943,"

may file a petition with the Tax Court "for a redetermination thereof."

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2. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE LETTERS MAKING SPECIAL CONDITIONS 42 AND 42A A PART OF EACH ORDER PREVENTED AND ESTOPPED PLAINTIFFS FROM ASSERTING THE UNCONSTITUTIONALITY OF THE RENEGOTIATION ACT.

The lower court made two conclusions of law, summed up in the foregoing heading, which read as follows:

> "1. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A establishes an agreement on behalf of plaintiffs to be bound by the Renegotiation Act and thereby said agreement became a part of every purchase order, notwithstanding anything therein to the contrary; the parties having thus contracted, it becomes immaterial whether the Act is constitutional or not. Therefore, the parties by their own contract have eliminated the constitutional question."[42]

> "2. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A, the conduct of plaintiffs in continuing thereafter to accept pur-

[42]R. 240.

chase orders from the defendant and to perform the same creates an estoppel and thereby plaintiffs have waived their right to assert the unconstitutionality of the Renegotiation Act and are estopped at this late date to retain any excessive profits. Having accepted the benefits of said purchase orders, they are not now in a position to avoid the terms under which said purchase orders were issued and received."[43]

The lower court, in Finding of Fact No. 4,[44] sets forth the letter of plaintiffs to defendant under date of November 14, 1942. The findings do not set forth the letter of defendant to which plaintiff's letter was a reply. We set forth both letters for the convenience of the court omitting the Special Conditions which were printed on the reverse side of plaintiff's letter. These Special Conditions are set forth in Finding of Fact No. 4 and which we printed in full in our statement of the case, supra.

[43]R. 241.
[44]R. 234.

Douglas Aircraft Company, Inc.
Santa Monica, California

September 14, 1942

Cable Address "Douglasair"

In reply refer to File G305NM

Mailing Address: Materiel Division, P. O. Box 9337, Station S. Los Angeles, California.

To All Vendors:

Subject: Renegotiation Clause

Gentlemen:

You are probably familiar with Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public Law 528, 77th Congress, approved April 28, 1942). This is the statute prescribing renegotiation for government contracts and subcontracts thereunder.

Section 403 requires us to insert a renegotiation clause in each subcontract involving more than $100,000, and the provisions of some of our more recent contracts define "subcontract" as including practically everything we buy. Furthermore, we suspect that we should insert it in each purchase order, since the total orders to any firm under a given contract may aggregate more than $100,000. Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order. It is much simpler to do this by means of a blanket agreement than by attaching the clause to each order. Hence we are enclosing two copies of such a blanket agreement, with the request that you execute one and return it to us.

As we construe Section 403, the statute is applicable to all orders, though the clause need be inserted only when more than $100,000 is involved. Therefore we are not altering your rights or liabilities by this blanket agreement, which is only a declaration of your present position. Your execution of it is thus only a formality, but it is a formality which the Government seems to desire and which we are trying to make as painless as possible.

Yours sincerely,
Douglas Aircraft
Company, Inc.

(signed) D. J. Bosio
Chief of Materiel Division

NM:lm
Enc.

First Around the World

November 14, 1942

Douglas Aircraft Company, Inc.
Materiel Division

P. O. Box 9337, Station S.
Los Angeles, California

Subject: Renegotiation Clause

Gentlemen:

We have received your letter of September 14, 1942, on the subject of renegotiation.

We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be appli-

cable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective.

Yours sincerely,

Manlove & Spaulding Mfg. Co.

(signed) By R. E. Spaulding
Partner

Note: Execution should be by an authorized officer or a general partner.

In Purch. Nov. 16, '42 AM

The two foregoing conclusions of law of the lower court are contrary to both the law and the facts, for each of the reasons hereinafter set forth, and did not justify the lower court in refusing to determine the constitutionality of the Act in question.

(a) The Letters Were Not an Unqualified Adoption of the Renegotiation Act, But Limited the Effect Thereof to the Class of Contracts Specified in the Letter of Plaintiffs.

The lower court concluded that the letters constituted an agreement and "thereby became a part of every purchase order". This conclusion is manifestly erroneous.

The letter of plaintiffs contains the following express reservation and proviso:

> "* * * provided, however, that *this agreement shall cover only purchase orders in which you are required by law* or by contract *to insert such*

> *Special Conditions,* and shall continue only so long as such requirement may be effective."[45]

The Renegotiation Act is explicit as to the kinds of subcontracts in which prime contractors must insert such conditions.

Section 403(b) (1) and (3) of the Act specifically provides as follows:

> "(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—
>
> (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; * * *
>
> (3) a provision requiring the contractor to insert in *each subcontract for an amount in excess of $100,000* made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract * * *."

The agreement cannot be extended beyond the express terms of the proviso in plaintiff's letter, which proviso limited the inclusion of the Special Conditions to subcontracts in which defendant either by law or contract, was required to insert a provision for the renegotiation of the contract price, viz.: contracts "in excess of $100,000".

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[45]All italics appearing in quotations in this brief, including court decisions, unless otherwise noted, have been supplied by the writers.

It must be noted that the withholding order of the Under Secretary of War was based solely on the order determining excess profits for the year ending December 31, 1942. The lower court expressly found as follows:

> "6. That all of the business done by plaintiffs during the fiscal year ending December 31, 1942, was with private firms, corporations and individuals and none of such business was done on prime contracts with the United States of America. *All the individual orders and contracts of plaintiffs for the year 1942 varied in amounts from 60 cents to $8,000.00 each.*"[46]

Assuming, without conceding, that the parties by letters could have eliminated the question of the validity of the Act, it must be concluded that they did no such thing. The agreement was restricted to a contract involving $100,000 or more, there never was such a contract or any contract in excess of $8000. It follows that the conclusion reached by the lower court was erroneous, and the parties did not eliminate the constitutional question.

(b) The Letter Applied Only to Contracts Between Plaintiffs and Defendant. It Did Not Apply to Contracts Between Plaintiffs and Any Other Person or Firm.

Disregarding for the moment the preceding point, the lower court erred in its conclusion that plaintiffs could not raise the constitutional question.

The order purporting to determine that plaintiffs made excessive profits during the year 1942,[47] is based

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[46]R. 239.
[47]R. 6.

upon all the business done by plaintiffs with all of its customers. The letter on which the lower court based its conclusions could only apply to business done with defendants. There never was any purported or other renegotiation of the orders placed by defendant with plaintiffs. These orders may have been, even in the opinion of the Secretary, fair and reasonable and not excessive as to profits.

Even if we assume that such letter authorized the Secretary to renegotiate the orders placed by defendant with plaintiffs, by no stretch of the imagination can such letter be construed as an authorization for the Secretary to renegotiate all of the business done by plaintiffs. As plaintiffs never agreed that a renegotiation of all its business for the year should be done by the Secretary, they have the right—which they never surrendered—to protest the validity of such action by the Secretary.

(c) The Letter Was Not Retroactive But Only Prospective in Operation.

The conclusions of the lower court imply that the letter of plaintiffs—dated November 14, 1942—was retroactive and constituted an agreement that renegotiation could be made of all plaintiffs' business for the entire year of 1942.

The letter refers only to orders to be issued in the future. It, therefore, can have no application to any subcontracts to which plaintiffs were a party during the ten and one-half months preceding the writing of the letter. The order determining excessive profits covers the entire year of 1942. As the Government had

no power, arising from the letter, so to do, the plaintiffs are not prevented from questioning the attempt to exercise such power and asserting the unconstitutionality of the Act.

Furthermore, there is nothing in the entire record to show that defendant placed any orders with plaintiffs between November 14, 1942 and January 1, 1943.

(d) The Letter Did Not Constitute an Agreement That Plaintiffs Should Be Bound by the Renegotiation Act as to Every Order Placed by Defendant and Did Not Eliminate the Constitutional Question.

The lower court concluded that the letter of November 14, 1942, was tantamount to a private contract between the parties "agreeing that all work orders would be filled and the charges therefore would include no excessive profits, leaving the determination of excessive profits solely and exclusively to arbitration by a third party" (a government agency).[48] This conclusion is erroneous in many particulars.

The letter was not an agreement applying to all work orders. It applied only to individual orders amounting to $100,000 or more.

The letter did not apply to any orders placed prior to November 14, 1942.

The letter was not an agreement for arbitration of the price arrived at by competitive bidding. If all such orders given as the result of competitive bidding were subject to arbitration, then the competitive bidding became a mere matter of words without any force

[48]R. 224, Opinion of District Judge.

or effect. Defendant, under a like agreement, could have given the work to anyone and later had the contract price readjusted *downward* (the Act does not allow for a raise in the contract price as the result of renegotiation) merely by insisting on such arbitration under the guise of renegotiation.

However, the defendant could not avail itself of such arbitration by renegotiation. *Defendant was given no power to renegotiate.* The power to renegotiate is with the Secretary of a Department and this he may or may not do according to his whim. On renegotiation no refund is made to the defendant, the money is turned into the Treasury of the United States.

Under renegotiation defendant would not be relieved of paying the entire contract price, but would have to pay the entire price in part to plaintiffs and the balance to the United States.

No matter which way the letter is construed, it cannot be construed as either a condition or agreement operating in favor of the defendant or one that the defendant could enforce in any manner. Thus, the entire premise of the lower court's conclusion falls to the ground.

(e) The Letter Could Not Confer on the Government the Power to Do That Which Under the Law It Could Not Do.

The lower court's conclusion is that by agreement between private parties they conferred on the Government the power (at the Government's option, uncontrolled by either party) to interfere with the obligation of a private contract. Under the Constitution the

Government cannot interfere with the obligation of a private contract or rights of either party to such contract.

To avoid repetition we refer the court to our argument on this point later in this brief, where the matter is discussed under the unconstitutionality of the Act.

Jurisdiction or power to proceed and determine cannot be created or conferred by consent or agreement of the parties. This rule applies to all public officers whether judicial, executive or ministerial.

Neff v. Redmond, 54 Cal. App. 757, 759, 202 Pac. 955.

(f) Plaintiffs Have Neither Waived the Right Nor Are Estopped From Asserting the Unconstitutionality of the Act.

The lower court concluded that plaintiffs, by their letter and acceptance of orders from defendant, had waived their right to assert the unconstitutionality of the Act and are estopped to retain any excessive profits. (Conclusion of Law No. 2, supra.)

This conclusion is, in effect, but a restatement of Conclusion of Law No. 1, heretofore discussed, and all the arguments advanced as to the erroneousness of that conclusion apply with like force to Conclusion of Law No. 2.

Estoppel, either by contract, act or statement, is a mutual transaction, on the one side being the person making the act or statement and on the other side being the person who acted upon such act or statement. Estoppel never operates in favor of a third

person who is a stranger to and not in privity with any party to the original bilateral transaction.

Estoppels to be good must be mutual (*Litchfield v. Crane,* 123 U. S. 549, 31 L. ed. 199). No estoppel arises in favor of one not a party to the transaction or in privity with a party thereto (*Deery v. Cray,* 72 U. S. 795, 18 L. ed. 653, 655).

In *Ottawa v. Perkins,* 94 U. S. 260, 24 L. ed. 154, 157, it is stated:

> "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law today, and not a law tomorrow; a law in one place, and not a law in another in the same State. And whether it be a law or not a law is, a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

In the case at bar neither plaintiffs or defendants could have insisted on a refixing of each contract price by renegotiation. There was no mutuality in the transaction. The Government was not a party. The conclusion of the lower court is erroneous.

3. THE DISTRICT COURT ERRED IN CONCLUDING THE ACTION WAS ONE THAT HAD TO DO WITH JUDICIAL INTERFERENCE WITH CONGRESSIONAL OR EXECUTIVE ACTION IN EXPENDING PUBLIC FUNDS.

The lower court made the following conclusion of law:

> "3. This action presents no justiciable controversy for the reason that this Court has no power to interfere with the exercise by Congress of its conditional power to prescribe and define the terms and conditions under which the Executive Department of the Government may expend moneys appropriated by the Congress."[49]

Granted that the Judiciary cannot interfere with congressional action in defining the conditions under which the Executive Department can expend public moneys, where such expenditure and the terms and conditions relative thereto are lawful and the power is exercised in a lawful and constitutional manner, it does not follow that the courts are impotent to so interfere where the power is exercised in a manner or for an end prohibited by the Constitution.

If the conclusion reached by the lower court were sound, *then the Judiciary could never declare any Act of Congress as being in violation of the Constitution if it dealt with the expenditure of public funds or prescribed the terms and conditions under which some other branch of the Government was to disburse such funds, even though the Act ran counter to the Constitution.* Such is not the law.

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[49]R. 241.

Here, we have no question of judicial interference with the exercise by Congress of its power to appropriate and expend public moneys, nor with prescribing the conditions under which a branch of the Government shall disburse such funds. We have here no question of contract between the Government and a contractor—a prime contract. Whether defendants, in a prime contract with the Government, are barred or estopped from questioning the validity of the Act is not a question in the case. The instant case deals with private contracts between private individuals—contracts to which the United States is not a party.

The instant case *has not to do with the expenditure of public moneys,* but deals directly with *taking by the Government of money* admittedly due to plaintiffs from defendant under a private contract.

That such an action on the part of the Government does not fall within the realm of expenditure of money or interference by the Judiciary with Executive action as to the terms under which such public moneys shall be disbursed, is directly and completely answered by a decision of the Supreme Court rendered this year.

The case of *Coffman v. Breeze Corporations, Inc.,* 323 U. S. 316, 65 Sup. Ct. (Ad. Op.) 303, 89 L. ed. (Ad. Op.) 255,[50] had to do with the *Royalty Adjustment Act* of October 31, 1942 (56 Stat. 1013; 35 USCA secs. 89-96). Coffman, the owner of a United States patent, entered into an agreement licensing Federal to manufacture and sell the patented device at a royalty

[50]We here quote extensively from the case as it is peculiarly applicable to and controlling of another point hereafter discussed.

of 6% of the licensee's selling price. Thereafter Breeze Corporations acquired all the rights of Federal. Thereafter Breeze became engaged in supplying the War and Navy Departments with the patented device under Government contracts.

The Supreme Court summarized the Royalty Adjustment Act as follows:

> "The Royalty Adjustment Act provides that whenever a patented device is 'manufactured, used, (or) sold * * * for the United States' under a license stipulating for payment of royalties *'believed to be unreasonable or excessive'* by the head of the government agency concerned, he 'shall give written notice of such fact to the licensor and to the licensee'. It provides that within a reasonable time thereafter the head of the agency *'shall by order fix and specify such rates or amounts if any, as he shall determine are fair and just,* taking into account the conditions of wartime production.' The Act directs the licensee, after the effective date of the notice, not to 'pay to the licensor, nor to charge directly or indirectly to the United States a royalty, if any, in excess of that specified in said order * * *'.
>
> "* * * By § 4 any reduction in royalties authorized by the Act is to 'inure to the benefit of the Government by way of a corresponding reduction in the contract price to be paid * * * or by way of refund if already paid to licensee.' "

The Supreme Court then states the following things were done by the War and Navy Departments:

> "In December 1943, the War and Navy Departments issued royalty adjustment orders under § 1

of the Act, purporting to reduce to specified amounts, declared to be *'fair and just'*, the royalties accruing on the manufacture and sale of the patented device for the War and Navy Departments, with maximum royalties of $50,000 per year commencing January 1, 1943. The orders further directed Federal and Breeze to pay to the Treasurer of the United States 'the balance in excess' of the royalty payments authorized by the orders 'which were due to Licensor and were unpaid on the effective date' of the notice, or which might thereafter become due to the licensor."

(Note how parallel are the provisions of the Royalty Adjustment Act and the procedure of the government departments thereunder with the provisions of the Renegotiation Act and the course followed by the Under Secretary of War.)

Large amount became due to Coffman as royalties under his license agreement, which Federal and Breeze refused to pay. Coffman then brought suit in equity in the District Court to enjoin Federal and Breeze from paying his royalties into the Treasury of the United States under said orders of the War and Navy Departments and asking for a declaratory judgment determining that the Royalty Adjustment Act was unconstitutional and offered no justification for the refusal to pay. The validity of an Act of Congress being in issue the Government was allowed to intervene. The District Court held there was no justiciable issue before the equity side of the court. The Supreme Court upheld the action of the lower court on the ground that *Coffman had an adequate remedy at law*

in a suit against Federal and Breeze to recover his royalties under the license agreement *and in that suit the validity of the Act, if set up as a defense, would be a justiciable issue in the case.* The Supreme Court's language follows:

> "Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. *In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, he can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense.* Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. *If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication* would depend appellant's right of recovery.
>
> "But whether the provisions of the Act be valid or invalid appellants show no ground for equitable relief. *If valid they would be a defense, and appellant would be entitled to no relief* * * *. *If invalid, appellant's right to recover remains unimpaired.* The sufficiency of the defense may be as readily tested in a suit at law to recover the payment of the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury."

The foregoing case *answers all the conclusions* erroneously made and arrived at by the lower court. The *Coffman* case had more to do with the power of Congress to appropriate money and prescribe the conditions under which it should be expended than does the case at bar, which does not involve such a question at all.

The instant suit was one at law to recover money due under a contract. The defense offered was the validity of the Renegotiation Act. If the Act be valid, plaintiffs cannot recover. If invalid, they are entitled to judgment for the full amount admittedly due. It was the duty of the lower court to pass upon this question.

That the theory upon which the case was submitted to the lower court by all parties was in strict accord with the rule announced in the *Coffman* case, appears from the lower court's Finding of Fact No. 5, which reads in part as follows:[51]

> "It is admitted that defendant's refusal to pay plaintiffs the amount so withheld is based solely on the withholding order issued by the Under Secretary of War and plaintiffs admit that if the Renegotiation Act is constitutional they have no cause of action. Defendant and intervenor admit that if the Renegotiation Act is unconstitutional, plaintiffs should recover and judgment should be for plaintiffs."

[51] R. 239.

4. THE DISTRICT COURT ERRED IN HOLDING THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Conclusion of Law No. 4, reading as above, is erroneous for all of the reasons heretofore advanced and argued and particularly under the doctrine announced in the case of *Coffman v. Breeze Corporations, Inc.*, supra.

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5. THE DISTRICT COURT ERRED IN DENYING THE MOTION OF PLAINTIFFS FOR JUDGMENT.

As pointed out above, plaintiff moved the court for judgment on the ground that the money was admittedly due and, as the Renegotiation Act was unconstitutional it offered no justification for defendant's refusal to pay the money (R. 8-10). As the Act is unconstitutional, as hereinafter demonstrated, the lower court erred in not granting the motion and ordering judgment entered for plaintiffs in the stipulated amount.

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6. THE ACT IS VOID AS CONSTITUTING AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

The Constitution vests in the Congress all law making power (Art. I, sec. 1). In delegating to the Congress the power to make laws, it was the intention of the framers of the Constitution that this power should be exercised by the Congress in order to maintain our system of checks and balances and keep distinct the branches of our Federal Government. Indeed, the inability of Congress to delegate any of its

legislative powers to executive, judicial or administrative branches of the Government has never been doubted. As was said in *Panama Refining Company v. Ryan,* 293 U. S. 388, 421, 79 L. ed. 446, 459:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, § 8, p. 18. *The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.*"

While it is true that in exercising its legislative power the Congress is not required to go into minute details covering every possible combination of facts and circumstances, it, nevertheless, must provide in its enactment both a definite policy and definite standards. It is only when legislation contains these two essential factors that Congress can leave to some other branch of the Government the administration of the enactment, the making of rules for carrying it into effect and the power to find and fix the instances in which it shall become operative. In the *Panama Refining Company* case, supra, the Supreme Court announces this rule as follows:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been re-

garded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it *to perform its functions in laying down policies and establishing standards,* while leaving to selected instrumentalities *the making of subordinate rules within prescribed limits* and the determination of facts to which the policy as declared by the legislature is to apply. * * * But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, *cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.*"[52]

Later in the same decision it is stated:

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, *the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.*"[53]

Even if we assume, for purposes of argument, that the Congress had the power to legislate on the ques-

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[52]*Panama Refining Co. v. Ryan,* 293 U. S. at 421, 79 L. ed. at 459.

[53]*Panama Refining Co. v. Ryan,* 293 U. S. at 430, 79 L. ed. at 464.

tion of the United States being able to renegotiate contracts entered into between third parties and that it had the power to prohibit the earning of large profits and, in pursuance of such power, it could delegate to executive and administrative bodies the power to provide the mechanics for carrying into effect such legislation, the Renegotiation Act fails to comply with those requirements set forth above.

The unilateral order and determination of so-called excessive profits involved herein was made on February 2, 1944, more than two months before the Revenue Act of 1943 became a law. Thus the validity of the order and the law under which it was made must be determined by the terms of the original Act and its amendments as they existed on February 2, 1944.

A mere reading of the Act should demonstrate that the Congress therein "has established no standard, has laid down no rule" by which there is to be determined what are "excessive profits". The determining of what are "excessive profits" is left entirely to the arbitrary action, whim or caprice of executive officers.

Section 403(a)(4) of the Revenue Act of 1942 defines excessive profits as follows:

> "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

Clearly the foregoing is neither a definition of the term "excessive profits" nor a standard or guide whereby the executive officer can determine what are and what are not excessive profits.

> "To define is to limit, and that which is left unlimited and is to be determined only by such future action as the city may hereafter decide upon, is not defined."
>
> *Cincinnati v. Vester,* 281 U. S. 439, 448, 74 L. ed. 950, 955.

The purported definition of the term leaves it unlimited and defers the meaning of the term to some future action of a departmental secretary, at which time he may so limit and define it as to give it a hundred different meanings in as many different renegotiation proceedings.

Nowhere else in the Act is there any attempt to define what is meant by the term "excessive profits". Nowhere in the Act is there even an attempt to lay down any standard whereby the executive officer is to be guided in determining what are or what are not excessive profits. That these matters are left to his unlimited and uncontrolled discretion is made manifest by other portions of the Act.

Section 403(c)(1) reads:

> "Whenever, *in the opinion of the Secretary* of a Department, the profits realized or likely to be realized from any contract * * * may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price."

Section 403(c)(2) provides:

> "Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract * * *"

There is no provision of law that can be referred to wherein will be found any formula which could be construed as making definite such an indefinite phrase as "Excessive profits". Individuals and even courts will be found at great extremes when called upon to determine whether, under particular facts and circumstances, the return on investment, labor, materials, initiative and ability, is reasonable or excessive.

The courts, when called upon to interpret the word "excessive" have been unable to do so in a manner which would provide a standard to be applied under any and all conditions.

> "EXCESSIVE. A general term for what goes beyond just measure or amount, defined as meaning characterized by, or exhibiting excess; greater than the usual amount or degree; exceeding what is usual or proper; overmuch; the quality or state of exceeding the proper or reasonable limit or measure; tending to, or marked by, excess; unreasonably great, and clearly disproportionate."
>
> 32 *C. J. S.* p. 1154.

Congress in the Act *has not stated* what is a just measure of return, or what is the usual amount or degree of non-excessive profits, or what is the proper or reasonable limit or measure of return. These are matters left to the arbitrary determination of the executive officer. An arbitrary determination which is final and conclusive and not subject to judicial review.

The Supreme Court has heretofore passed upon and condemned legislation that cannot be distinguished

from the Act in question. The *Lever Act* (sec. 4) provided that it should be

> "unlawful for any person wilfully * * * to make any *unjust or unreasonable* * * * *charge* in * * * dealing in or with any necessaries," or to agree with another "to exact *excessive prices* for any necessaries."

The terms "unjust charge", "unreasonable charge" and "excessive prices", cannot be distinguished from the term "excessive profits". Any one of these terms is as vague and indefinite as the others.

The court was called upon to pass on the validity of the Act in each of the following cases:

United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. ed. 616;

Weeds v. United States, 255 U. S. 109, 65 L. ed. 537;

Small Co. v. American Sugar Co., 267 U. S. 233, 69 L. ed. 589.

In each case the Lever Act was held to be unconstitutional as being too vague and indefinite to comply with the due process of law provision of the Fifth Amendment.

In *Small Co. v. American Sugar Co.*, supra, the court's decision reads (267 U. S. at 238, 69 L. ed. at 593):

> "In a series of cases * * * this court held that provision invalid as contravening the due process of law clause of the 5th Amendment, among others, because it required that the transactions named should conform to a rule or standard which was

> so vague and indefinite that no one could know what it was. By copious references to judicial pronouncements and proceedings the court illustrated that the terms 'unjust', 'unreasonable' and 'excessive' as applied to prices by that provision had no commonly recognized or accepted meaning."

As the term "excessive prices" is "so vague and indefinite that no one could know what it was", then, perforce, the term "excessive profits" is "so vague and indefinite that no one could know what it was". As the Lever Act was unconstitutional because of the vagueness and indefiniteness of the term "excessive prices", so is the Renegotiation Act unconstitutional because of the vagueness and indefiniteness of the term "excessive profits". Just as the Lever Act was void because it contained no prescribed standard for determining what constituted "excessive prices", so is the Renegotiation Act void for containing no definition or standard by which to determine what constitutes "excessive profits".

Following the foregoing quoted language from the *Small Co.* case, the Supreme Court quotes the following language from its decision in the case of *United States v. L. Cohen Grocery Co.*, 255 U. S. at 89:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes (by court and jury after the act) to no element essentially inhering in the transaction as to which it provides. *It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and*

> *the result of which no one can foreshadow or adequately guard against.* In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, *to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalize and punish all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.*"

The last portion of the foregoing quotation (which we have printed in italics) is peculiarly applicable to the statute in question. As the Lever Act was unconstitutional in leaving to court and jury to determine whether any price charged was "unjust and unreasonable", so is the Renegotiation Act void as expressly and explicitly leaving to a Secretary of a Department the power of determining whether any profits are unjust and unreasonable, i.e., "excessive". Section 403(c)(1) expressly provides that such matter shall rest "in the opinion of the Secretary of a Department".

The *Small Co.* case also disposes of the contention that vague and indefinite statutes are only void when they apply to crimes. The court expressly held that the rule applied to both civil and criminal statutes in the following portion of its decision:

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.

> It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases."

In *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 79 L. ed. 1570, the Supreme Court condemned as unconstitutional the provisions of the National Industrial Recovery Act which attempted to delegate to the President the power to adopt and ratify codes of "fair competition". One of the reasons assigned by the court, as to the unconstitutionality of the Act, was the fact that the Act did not define the words "fair competition", the court pointing out that these words were susceptible of many different meanings and the Act left it to the arbitrary determination of the President to construe these words in any manner he saw fit.

In *Panama Refining Co. v. Ryan,* 293 U. S. 388, 79 L. ed. 446, section 9(c) of the N.I.R.A. was declared unconstitutional for the following reasons, among others, hereafter referred to (293 U. S. at 430):

> "We think that § 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, *the Congress has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions* in which the transportation is to be allowed or prohibited."

The foregoing should be sufficient to demonstrate that the Act is void, *first,* because it is so vague and indefinite as to be in violation of the due process clause of the Fifth Amendment—irrespective of any question of delegation of legislative power and, *secondly,* that it constitutes an unlawful delegation of legislative power because it sets up no standard to be followed by the persons to whom the power is attempted to be delegated.

So far, we have confined our criticisms to that language of the Act which uses the term "excessive profits"; but there are other portions of the Act which use terms equally as vague and indefinite and without any definition or standard being supplied whereby either meaning or limits can be ascertained.

Section 403(d) of the Act reads:

> "In renegotiating a contract price of determining excessive profits for the purpose of this section, the Secretaries of the respective Departments shall not make allowances for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees *in excess of a reasonable amount,* nor shall they make allowances for any *excessive reserves* set up by the contractor or for any *costs* incurred by the contractor *which are excessive and unreasonable.*"

The Act fails to state what shall constitute a reasonable salary, bonus or compensation or what is meant by "in excess of a reasonable amount". Neither does the Act prescribe what are "excessive reserves" or "excessive and unreasonable costs". All these matters are

left in the realm of conjecture and the various Secretaries are given arbitrary power to interpret these terms as each sees fit so to do. No standard, no guide is provided in the Act.

It may be well to call the court's attention to the things which the Renegotiation Act neither does nor attempts to do. The Act *does not* make unlawful or attempt to prohibit the making of any contracts between individuals—or an individual and the Government—even if such contracts relate to articles to be used in the war effort; it does not prohibit or make unlawful the charging of any price the parties may agree upon in such contracts; it does not make unlawful or prohibit the receiving of any profit, whether large or small, under any such contract; it does not declare that any such contract shall be unlawful or unenforceable between the parties. The Act in all instances is retroactive in operation. It permits the Government, after private parties have contracted and performed, to step in and recover for the Government a sum of money in every instance wherein a Secretary shall be of the opinion that one party to the contract earned too much money.

7. THE ACT IS VOID AS NOT PROVIDING FOR FINDINGS OF FACT ON WHICH IS BASED THE ORDER DETERMINING EXCESS PROFITS. THE ORDER IS VOID IN NOT CONTAINING SUCH FINDINGS.

The Renegotiation Act contains no provision requiring a Secretary to make any findings of fact on which is based any order determining excess profits. The order in this case contains no data or findings disclosing the basis for a determination that $110,000 constituted excess profits.[54]

As indicative of the unfairness of such a procedure we call attention to the fact that on April 11, 1944, the Secretary of War was requested by plaintiffs, in writing, to furnish "a statement of such determination together with a statement of the facts used as a basis therefor." A written reply was received stating that it was against the policy adopted to disclose such data, facts or findings.[55]

It is of further interest to note that the letter refusing to disclose such data bases the denial of such information on the ground that the Revenue Act of 1943 (which does provide for findings) is not retroactive and does not apply to determinations made prior to the effective date of that Act.

In *Panama Refining Co. v. Ryan,* 293 U. S. 388, 433, 79 L. ed. 446, 465, it is expressly pointed out that delegated legislative authority cannot be constitutionally exercised by the person to whom delegated unless findings are made in support of any order, whether the Act does or does not provide for findings.

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[54]Complaint, p. 4.
[55]See, affidavit of R. E. Spaulding, R. 217.

The language in the *Ryan* case is as follows:

> "Referring to the ruling in the Wichita R. & Light Co. case, the Court said in Mahler v. Eby, 264 U. S. 32, 44, 68 L. ed. 549, 556, 44 S. Ct. 283: 'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.' We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation."

In the case of *Mahler v. Eby,* quoted from in part in the last quoted decision, a more full quotation of the language used therein is as follows:

> "In Wichita R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. Rep. 51, a statute of a state required that a public utility commission should find existing rates to be unreasonable before reducing them, but *there was no specific requirement that the order should contain the finding.* We held that the order in that case made after a hearing, and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute, but also on general principles of constitutional government."

Here we have not only an absence of findings on which the unilateral order was based, but *we have an*

announced policy by the officials to whom the power of renegotiation is delegated by the Act *never to make findings or even to supply to the person injured by the order the data and figures on which is based the final determination of excessive profits.*

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8. THE ACT IS INVALID AS DELEGATING PURELY JUDICIAL FUNCTIONS TO A NON-JUDICIAL BODY.

The Renegotiation Act vests in the Executive Department the power to determine what shall constitute just compensation in all cases of contracts falling within the purview of the Act.

The Act further empowers the Secretaries to take from sub-contractors their property without just compensation.

It is fundamental that the question of compensation is purely a judicial question, to be determined in a judicial tribunal.

> "Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622."
>
> *Seaboard Air Lines Co. v. United States,* 261 U. S. 299, 67 L. ed. 664, 669.

> "The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the

compensation shall be, or to prescribe any binding rule in that regard."

United States v. New River Collieries Co., 262 U. S. 341, 344, 67 L. ed. 1014, 1017.

Taking the earnings, fixed by contract, from an individual and covering such sums into the federal treasury is the taking of property. To deprive a contracting party of his rights under a contract is likewise the taking of property.

"The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."

Lynch v. United States, 292 U. S. 571, 579, 78 L. ed. 1434, 1440.

As the Act only relates to war contracts, i.e., contracts for the furnishing to the United States of articles of war, the matters produced as the result of such contracts are property taken by the United States. For such property there must be just compensation and the stipulated compensation in the contracts cannot be altered by any department of Government or a proper amount fixed except by a judicial body.

The attempt of the Act to vest the final determination of the question of compensation in the Secretaries of Executive Departments is an attempt to divert from the judiciary to the executive branch of the Government those matters falling exclusively within the jurisdiction of the courts. Such action is contrary

to the Constitution which vests the judicial power in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. (Constitution, Art. III, sec. 1.)

> "The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause * * * when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount."
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> *Baltimore & Ohio R.R. Co. v. United States,* 298 U. S. 349, 368, 80 L. ed. 1209, 1224,

and later on the same page of the foregoing case it is stated:

> "But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based on it."

The determination of a Secretary is not designated as an interlocutory order, subject to review in the courts. Under the Act there is no provision for notice and hearing, no findings are required and resort to the courts is prohibited. Clearly this violates every concept of due process.

9. THE ACT IS VOID AS PRECLUDING A RESORT TO THE COURTS FOR A JUDICIAL REVIEW OF THE ORDER.

The Renegotiation Act, as it operated on February 2, 1944, expressly made the action of the Secretary final and not subject to review in any of our duly constituted judicial tribunals. (Sec. 403(c)(4).)

Any statute that by its terms or intendment precludes recourse to the courts is in violation of the 5th Amendment.

> "If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, M. & St. P. R. Co. v. Minnesota, supra. A law which indirectly accomplishes a like result by imposing such conditions upon the right of appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."
>
> *Ex parte Young,* 209 U. S. 123, 147, 52 L. ed. 714, 724.

It may be argued that as the Revenue Act of 1943—passed after the order involved herein—provides for a hearing *de novo* in the Tax Court, that such provi-

sion cures the deficiency in the Act as it existed up to that time. However, the provision in the Revenue Act of 1943 is subject to the foregoing invalidity. The Act makes the decision of the Tax Court final. The Tax Court is not a judicial body, neither is it an arm of the judicial branch of our Government. The Tax Court is an independent agency in the Executive branch of the Government (26 U. S. C. A. 1100). In hearing Renegotiation matters the Tax Court is not required to file findings. No standards are fixed in the Act to guide the Tax Court in its determination. Whether the adjudication is made by a Secretary or by the Tax Court, recourse to the judicial tribunals is prohibited by the Act.

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10. THE ORDER DETERMINING EXCESSIVE PROFITS IS VOID AS BEING BASED ON SECRET DATA.

As showing the particular viciousness and lack of constitutional procedure adopted by the Secretary, together with lack of general or special findings, we again call attention to the unilateral order determining excessive profits involved herein. This order provides that "the Under Secretary of War considered certain financial, operating and other data, submitted by the contractor *or obtained by the Under Secretary of War from governmental or other reliable sources.*"

Not only must an order made under delegated legislative authority contain findings, but such order must be based upon competent evidence properly received and under such circumstances as will advise

the injured party of the nature of such material in order that he can refute or introduce evidence contrary thereto. Such findings and required evidence are also necessary in order that a court may be apprised of the evidence on which the official acted in order to determine the reasonableness and validity of the ultimate order.

In *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. ed. 1093, the Commission made an order, as stated in the opinion of the court, "upon the strength of information secretly collected and never yet disclosed." The company there involved asked disclosure of this secret evidence just as plaintiff herein demanded such facts of the Secretary of War. There was a refusal of disclosure in both cases. The court condemned this procedure in the following language:

> "From the standpoint of due process—the protection of the individual against arbitrary action —a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof there is at least an opportunity in connection with a judicial review of the decision to challenge the deduction made from them. The opportunity is excluded here. The Commission,

> withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

As the order purporting to determine excessive profits is void on its face, in expressly disclosing a violation of the due process clause, any order purporting to withhold money based thereon is likewise void and can constitute no justification for defendant refusing to pay the amount due to plaintiffs.

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11. THE RENEGOTIATION ACT IS VOID AS CONTAINING NO PROVISION FOR NOTICE AND HEARING.

By the complaint filed herein plaintiffs directly raised the question that the Renegotiation Act violates the due process of law clause of the Constitution in that "it contains no provisions for giving to the person whose contract is sought to be renegotiated a hearing or notice of place and time of hearing of such renegotiation."[56] The Act specifically provides that there shall be no review in the courts.

Where a statute deals with the rights of person or property such statute must contain provision for notice of time and place of hearing and afford the party

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[56]Complaint, paragraph V(f)(12).

an opportunity to present evidence and to be heard. Lack of such provision renders the statute void.

It is not sufficient that the party may be given such notice or opportunity as a mere matter of grace. Neither is it material that the persons administering the statute attempt to comply with due process by giving notice and an opportunity to be heard.

> "*Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires.* In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: '*It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.*' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. *It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute*' (citing the New

York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' "

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 1032.

Immediately preceding the foregoing language the Supreme Court disposes of the contention that if statutory notice and hearing had been provided for the same results would have been brought about. Its language is as follows:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

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12. THE ACT IS VOID AS AUTHORIZING THE ABROGATION OF CONTRACTS BETWEEN PRIVATE INDIVIDUALS.

We are not here concerned with the right of the Government to abrogate contracts to which it is a specific party. The question now presented is whether the United States can, by the arbitrary action of an executive or administrative officer, interfere with, impair the obligation of and actually abrogate contracts freely and voluntarily entered into between individuals and in accord with the law. That Congress has no such power brooks of no argument.

We concede that private contracts must be entered into with an understanding on the part of the parties that they cannot limit or foreclose the Government from pursuing any necessary governmental function, including the right to pass general laws. This, however, is something entirely distinct from the right of Congress, by special legislation, to change agreed compensation provided for in private contracts.

(In passing we point out that even if it be assumed, for purposes of argument, that Congress had this power it has failed to exercise it in a manner consistent with constitutional requirements.)

In the case of *Lynch v. United States,* 292 U. S. 571, 78 L. ed. 1434, the court points out that contracts are property and that when the Federal Government enacted the War Risk Insurance Act it created a vested right in those availing themselves of its provisions which Congress could not take away without making just compensation. The court thus points out the limitations imposed on Congress by the Fifth Amendment relating to contracts between individuals as follows:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns."

It will be seen that the foregoing language is peculiarly applicable to contracts entered into between private contractors and sub-contractors, as distin-

guished from contracts entered into between contractors and the United States.

The Renegotiation Act is a law acting directly and independently to the end of abrogating contracts between private citizens. That Congress has no such power is stated in the case of *Continental, etc., Co. v. C.R.I. & P. R. Co.*, 294 U. S. 648, 680, 79 L. ed. 1110, 1130, as follows:

> "The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as Calder v. Bull, 3 Dall. 386, 388, 1 L. ed. 648, 649, it was said that among other acts which Congress could not pass without exceeding its authority was 'a law that destroys or impairs the lawful private contracts of citizens.' The broad reach of the statement has been restricted (Legal Tender Cases, 12 Wall. 457, 549, 550, 20 L. ed. 287, 311, 312); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed. Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."

If the obligation of a contract is impaired, within the meaning of the Constitution, when the right to enforce by legal process is taken away or materially

lessened, then, manifestly, when the very obligation assumed by one of the contracting parties is directly and arbitrarily changed, the right to enforce the contract by legal process is destroyed. In other words, when private parties agree upon a contract price the arbitrary action of the Government in reducing or raising that price, which action is made binding, final and conclusive by an Act of Congress, deprives the parties of the power to judicially enforce their contracts as written.

In the *Lynch* case, the court stated:

> "Punctilious fulfilment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. *But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.*"

As the Government has no power to abrogate its own contracts for the purpose of lessening expenditures or in order to permit of economy, it has no power to abrogate the contracts of private individuals for any like reasons. (See, also, *Perry v. United States,* 294 U. S. 330, 79 L. ed. 912.)

13. THE RENEGOTIATION ACT IS VOID AS AUTHORIZING GOVERNMENT INTERFERENCE WITH CONTRACTS TO WHICH THE UNITED STATES IS NOT IN PRIVITY.

It stands admitted in this case that the contracts involved during the fiscal year ending December 31, 1942, are contracts entered into between plaintiffs and third parties and not between plaintiffs and the United States or any Department thereof.[57]

In *United States v. Driscoll,* 6 Otto 421, 24 L. ed. 847, a contractor with the United States employed a laborer to work on the contract and was to pay such laborer. The laborer sued the United States in the Court of Claims for extra compensation. The evidence showed that the contractor received the money from the United States to pay the laborers together with fifteen per cent added. The Supreme Court held that the laborer had no cause of action against the United States, stating as follows:

> "It is clear that there was no privity between the appellee and the United States. Ordway employed him and was to pay him, and did pay him. The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen per centum in addition, was the measure of the amount to be paid to Ordway. The fact that Ordway procured the appellee's receipts, presented his own vouchers to the Government, and received his pay before paying his hands, is immaterial as regards the rights of the parties. It was a convenience to the contractor, and safe for Government. The hands trusted the former; and, if he had failed to pay them, the loss would

[57]Finding of Fact No. 6, R. 239.

have been theirs. The Government having the contractor's receipts, it could not have fallen upon the United States."

See, also,

National Surety Co. v. Washington Iron Works, 243 Fed. 260.

The contracts for war materials were entered into between the United States and various contractors. It is to these contractors the United States had to look for the fulfillment of its contracts. The contractors in turn entered into contractual relations with sub-contractors and as between these parties the Government had no interest. If the prime contractors failed to live up to their agreements, then the Government had recourse directly against them. If the Government failed to live up to its agreement the prime contractors in turn could seek redress against the United States (see, *United States v. Bethlehem Corp.* 315 U. S. 289, 86 L. ed. 855). On the other hand if the contractor failed to pay the sub-contractor or breached his contract, the sub-contractor could only seek redress against the prime contractor. He could not proceed against the United States.

No privity of contract existed between the United States and sub-contractors. The United States was without power to interfere with the contracts entered into between the prime contractor and the sub-contractor. Being without such power the Congress is without power to so interfere or to delegate to any other branch of the Government the power of so interfering.

CONCLUSION.

The case was presented to the lower court upon a theory mutually adopted and agreed upon by plaintiffs, defendant and the United States, viz.: that the only question involved was the constitutionality of the Act (R. 239). The lower court refused to decide the case upon such theory and sought for a way to avoid passing on the constitutionality of the Act. Every reason and conclusion set forth by the lower court as a justification for not passing on the constitutionality of the Act was erroneous. As the Act is unconstitutional judgment should have gone for plaintiff.

The judgment of the lower court should be reversed with directions for the lower court to order judgment for plaintiffs in the stipulated amount.

Dated, San Francisco,
November 14, 1945.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

REVENUE ACT OF 1942. THE ACT OF OCTOBER 21, 1942 (PUBLIC LAW 753, 77TH CONGRESS, 2D SESS.), 56 STAT. 798, 982.

TITLE VIII—RENEGOTIATION OF WAR CONTRACTS

SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and (iii) a provision for relieving the con-

tractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such

Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money re-

covered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the contract which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate or eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or

(ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(b) Subsection (f) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

(i) (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body,

of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department.

(d) The amendments made by this section shall be effective as of April 28, 1942.

Approved, October 21, 1942, 4:30 p. m.